NO. 48365-3-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

v.

STEVEN PESCHL,

Appellant.

---

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAMANIA COUNTY

The Honorable Brian Altman , Judge

# OPENING BRIEF OF APPELLANT

---

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**WASHINGTON CASES** **Page**

**UNITED STATES CASES** **Page**



**REVISED CODE OF WASHINGTON** **Page**



**CONSTITUTIONAL PROVISIONS** **Page**



**COURT RULE** **Page**

## A. ASSIGNMENTS OF ERROR

1. The state did not prove beyond a reasonable doubt the elements of second degree burglary, in violation of constitutional due process.

2. The appellant did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request that the trial court consider a lesser included offense supported by facts elicited at trial.

3. The trial court erred when it failed to enter written findings of fact and conclusions of law pursuant to CrR 6.1(d) after hearing the non-jury trial.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Constitutional due process requires the State to prove beyond a reasonable doubt all elements of a crime. To prove the crime of second degree burglary, the state must prove the defendant entered or remained unlawfully in a building with the intent to commit a crime therein. Did the State prove the elements of second degree burglary where it did not prove beyond a reasonable doubt that Steven Peschl entered an enclosed, fenced area located at the Skamania County Rock Creek county shop yard with the intent to

commit a crime? Assignment of Error 1.

2. Mr. Peschl did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request that the court consider the lesser included offense of second degree criminal trespass when that offense was supported by facts elicited at trial? Assignment of Error 2.

3. Did the trial court err when it failed to enter written findings of fact and conclusions of law pursuant to CrR 6.1(d) after hearing the non-jury trial. Assignment of Error 3.

## C. STATEMENT OF THE CASE

Steven Peschl was charged in Skamania County Superior Court by information with one count of second degree burglary, RCW 9A.52.030(1), and one count of third degree theft, RCW 9A.56.050. Clerk's Papers (CP) 1-2. Mr. Peschl waived his right to a jury trial and the case was tried to the bench on November 24, 2015. 2RP at 4-74.[1]

The court heard the following testimony. While driving by the Skamania County Rock Creek shop yard in Stevenson, Washington after

[1]The record of proceedings consists of two volumes and is designated as follows:
1RP November 12, 2013, November 25, 2013, January 30, 2014, February 27, 2014, May 1, 2014, May 15, 2014, July 31, 2014, October 30, 2014, December 11, 2014, February 26, 2015, May 28, 2015, July 2, 2015, July 30, 2015, December 3, 2015 (sentencing); and
2RP November 24, 2015, (bench trial).

dark on November 9, 2013, Wayne Martin thought he saw a "shadow" behind a vehicle parked inside a fenced yard area of the shop area. 2RP at 6. Mr. Martin turned around and drove by the county yard a second time and saw the same thing. 2RP at 6. Mr. Martin, who lives near the yard, parked at his house and returned on foot to the shop, where he saw someone walking across the road into a gravel parking lot, at which time he called the police and stated that someone was breaking into the yard or had been in the yard. 2RP at 6-7, 11. Deputies arrived and arrested Steven Peschl, a man who was known to Mr. Martin. 2RP at 15.

Deputies located Mr. Peschl's truck parked near the motor pool building of the yard. 2RP at 17. Mr. Peschl was found near his truck, which was backed in next to the motor pool building. 2RP at 17, 35. When contacted by police, he told the deputies that he had ran out of gas and had bought gas at a Jiffy Mart station and then pulled into the yard in order to put gas in his truck. 2RP at 19, 20, 36. The bed of the truck contained scrap metal includling a piece of an aluminum bleacher, a roll of wire, water valves and hand tools. 2RP at 21. Exhibit 6. There was also a red plastic fuel container with a broken nozzle and a red hose located near the truck. 2RP at 22, 23, 24, 36. Exhibit 2. A round metal campfire ring used for cooking over an open fire was located in the grass by the motor pool building near the

pickup truck. 2RP at 33. The metal in the truck appeared similar to a stockpile of surplus metal located inside the partially-fenced area of the yard. 2RP at 29.

The Facility Maintenance Manager for the county, Don Clack, testified that there is a chain link fence around the front of the motor pool shed and that the area is open in the back where there is no fence on the side of the property bordering Rock Creek. 2RP at 32, 46. There is a rolling gate in the fence portion and also a swinging gate. 2RP at 46. Mr. Clack stated that a piece of bleacher and a valve, along with other pieces of metal, were stored at the shop, and that the items "probably" had value as scrap metal. 2RP at 49. He stated that the fire ring was purchased by the county, but did not give a value. 2RP at 50.

Deputy Jay Johnston stated that the aluminum bleacher scrap and valves in the truck appeared similar to scrap metal stored by the motor pool building. 2RP at 29, 30. He also testified that wire in the back of the truck had fresh grass on one of the ends, indicating that it had been recently set in the grass. 2RP at 30.

Deputy Chris Helton testified that he has access to the Road Department building and sign storage area located at the yard. 2RP at 40. He stated that he entered the area of the yard—which was the area described to

him by Mr. Martin—through a locked gate. 2RP at 40. He stated that in the area there were several county pickup trucks "and that there seemed to be where the odor of gasoline was emanating from." 2RP at 40. In that area he found a fuel can spout that he testified fit the red fuel container found near Mr. Peschl's truck. 2RP at 40, 41.

A fence encloses the Road Maintenance Department portion of the shop yard, including fencing along the back portion of the yard, and is accessed through two secured gates. 2RP at 52, 53, 54. Until approximately three years before the incident, Mr. Peschl formerly worked for the Road Department. 2RP at 53.

The county Road Maintenance Superintendent Clay Moser did not recognize any of the metal items in the back of Mr. Peschl's truck as being from the Road Department's fenced portion of the shop yard. Although he testified that he saw a truck driveline that "may or may not" have come from the Road Maintnance yard, he added that he could not "say that there was anything there that I can say came from the Road Department." 2RP at 57.

After hearing testimony, the Court found Mr. Peschl guilty of both counts. 2RP at 76; CP 48. To date, the trial court has not entered written findings of fact and conclusions of law on the non-jury trial.

The parties agreed that Mr. Peschl had no crimional history resulting

in an offender score of "0," with a standard range of one to three months for Count 1. 1RP (12/3/15) at 2. The court imposed a standard range sentence of 40 days for Count 1, and 40 days in Count 2, to be served concurrently. 1RP (12/3/15) at 4; CP 51.

Timely notice of appeal was filed on December 8, 2015. CP 60. This appeal follows.

## D. ARGUMENT

### 1. THE STATE DID NOT PROVE ALL THE ELEMENTS OF SECOND DEGREE BURGLARY IN VIOLATION OF MR. PESCHL'S CONSTITUTIONAL RIGHT TO DUE PROCESS

#### a. Due process requires the State to prove every element of the crime beyond a reasonable doubt

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction should be reversed where no rational trier of fact, viewing the evidence in a light most favorable to the state, could find all elements of the charged crime proven beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 580, 210 P.3d 1007 (2009).

b. The State did not prove all the elements of second degree burglary.

The state charged Mr. Peschl in Count 1 with second degree burglary. CP 1. To prove the offense, the state was required to prove beyond a reasonable doubt that Mr. Peschl entered the fence encircling the Road Department section of the county yard and remained unlawfully within the fence, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1); CP 1. To support a second degree burglary conviction, the state had to prove that Mr. Peschl unlawfully entered a "building." RCW 9A.04.110(5) provides:

> "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building[.]

Here, the state's theory was that Mr. Peschl entered and took scrap

metal and syphoned gas from vehicles in the partially-fenced area of yard near the Motor Pool Building, and also entered and took gas from vehicles in the Road Department's yard, which is entirely fenced. 2RP at 61. The scrap metal located in the truck and the metal fire ring located near the motor pool building were not linked by testimony to the Road Department's yard. 2RP at 57. Mr. Moser was unable to identify any of the allegedly stolen items in the truck as originating from the Road Department. 2RP at 57. The scrap metal such as the brass valve and the aluminum bleacher were identified as being stored near or behind a shed located in the partially-fenced yard. 2RP at 46. Mr. Clack's testimony is clear that there is a chain link fence at the front of the yard but that it is open on the "creek side" of the area. 2RP at 46.

*Engel* is controlling authority in this case. Engel was convicted of second degree burglary for stealing wheels from the business premises of Western Asphalt. The property was protected partially by a fence and partially by steep slopes. The front gate was locked when the theft occurred. *Engel*, 166 Wn.2d at 574-75.

On appeal, Engel argued the evidence was insufficient to show he entered a building or fenced area because "the ordinary meaning of 'fenced area' is an area totally enclosed by a fence[.]" *Engel*, at 578. The state, on the other hand, argued "the common understanding of fenced area includes an area

partially enclosed by a fence, where topography and other barriers combine with the fence to close off the area to the public." *Id.*

The Supreme Court rejected the state's position and held that a partially fenced area does not meet the definition of "building" in RCW 9A.04.110(5). *Id.* at 580. This holding logically followed the Supreme Court's prior decision in *State v. Wentz*. 149 Wn.2d 342, 352, 68 P.3d 282 (2003) (backyard completely surrounded by a 6-foot high fence with locked gates is a "fenced area"), at 357 (Madsen, J., concurring) (fence "must enclose or contain an area"). The *Engel* Court reasoned the Legislature intended to limit the crime of burglary to those situations where a person unlawfully enters the curtilage of an enclosed area. *Engel*, 166 Wn.2d at 580.

> The curtilage is an area that is completely enclosed either by fencing alone or, as was the case in Wentz, a combination of fencing and other structures. This result is consistent with the common law and avoids absurd results.

*Id.* at 580 (emphasis added).

In addition, the state failed to present sufficient evidence that Mr. Peschl entered the fenced area of the yard associated with the Road Department. Mr. Martin testified that he saw a "shadow" in the yard and later saw a man cross the street and walk into a gravel parking lot. 2RP at 10.

Deputy Johnston stated that he saw open fuel doors on trucks and saw what appeared to be red material near the fuel cap of a vehicle that may have come from the rubber siphon hose, but the testimony makes it unclear in which portion of the yard he observed the open fuel doors. 2RP at 28. Deputy Helton testified that he located a fuel container nozzle in a fenced area which he described as the "District Two truck shop," but the testimony is unclear whether this fenced area is the same as the Road Department's enclosed yard. 2RP at 38-39. No evidence directly links Mr. Peschl to the enclosed Road Department yard.

The court may not infer intent to commit a crime from evidence that is "patently equivocal." *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that even where defendant broke a window, inference is equally consistent with two different interpretations - attempted burglary or malicious mischief). Here, even assuming that Deputy Helton was describing the Road Department's enclosed yard when he stated that he found a fuel cap nozzle that fit the fuel container located near Mr. Peschl's truck, there is insufficient evidence to support the state's contention that Mr. Peschl entered the yard in order to commit a crime. An equally plausible explanation is the Mr. Peschl found and threw the nozzle over the fence, without making entry into the enclosed yard, or that he originally owned the

nozzle but threw it into the yard after it was broken, which is the condition in which it was found.

The evidence is insufficient to support the burglary conviction. Because the jury was not instructed on a lesser included trespass offense, this Court should vacate the conviction in Count 1 and remand with directions to dismiss the charge with prejudice. *Engel*, 166 Wn.2d at 581; *In re Detention of Heidari,* 174 Wn.2d 288, 292-96, 274 P.3d 366 (2012).; *In re Winship*, 397 U.S. at 364.

c. Count 1 must be dismissed.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) Because the State did not prove all of the elements of second degree burglary, Count 1 must be reversed and dismissed.

**2. MR. PESCHL RECIEVED INEFFECTIVE ASSISTANCE OF COUNSELWHERE HIS ATTORNEY FAILED TO ARGUE TO THE COURT THAT HE COMMITTED THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS.**

a. Second degree criminal trespass is a lesser included offense of

second degree burglary.

Second-degree burglary requires an unlawfully entering or remaining in a building, accompanied with intent to commit a crime against a person or property therein. RCW 9A.52.030. A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully on premises without permission. RCW 9A.52.080. A lesser-included offense exists when all of the elements of the lesser crime are necessary elements of the greater crime. *State v. Holt*, 104 Wn.2d 315,318,704 P.2d 1189 (1985). Under Washington law, a first-degree criminal trespass is a lesser- included offense of the crime of second-degree burglary. *State v. Soto*, 45 Wn. App. 839, 727 P.2d 999 (1986); *State v. Allen*, 101 Wn.2d 355, 361, 678 P.2d 798 (1984).

b. Under the *Workman* test, Mr. Peschl was entitled to argue that he commited only the lesser included offense.

A criminal defendant is entitled to a jury instruction of a lesser-included offense when two conditions are met: First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In this case, the crime charged in Count 1 was burglary in the second

degree. Here, defense counsel elicited ample evidence that supported the court's consideration of the lesser included offense of criminal trespass. The key issues for the defense was that there was no evidence that Mr. Peschl was in the fenced area of the Road Department's portion of the yard and no evidence supported the allegation that he obtained gas from vehicles in that portion of the yard. 2RP at 64.

The elements of criminal trespass, a culpable mental state of "knowing" and an unlawful entry are necessary elements of second-degree burglary. The factual prong of the *Workman* test is satisfied when viewing the evidence most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included offense. *State v. Fernandez-Medina*, 141 Wn.2d 448,461, 6 P.3d 1150 (2000). Here, the only evidence was Mr. Martin's testimony that he saw "shadow" in the fenced portion of the yard and the testimony of Deputy Helton that he found the nozzle in an enclosed yard. Neither witness testified that he saw Mr. Peschl siphoning gasoline or carrying scrap metal from an enclosed area, and as noted supra, the deputy's testimony is far from clear whether the gas can nozzle was found in the enclosed portion of the Road Department, or in the non-enclosed portion near the motor pool building. None of the scrap metal was identified as coming from the Road

Department's portion of the yard. 2RP at 57.

Inasmuch as evidence does not definitively show that Mr. Peschl took fuel from a vehicles in the enclosed portion of the yard, it supports the inference that if Mr. Martin did see Mr. Peschl in the enclosed area and that Mr. Peschl put the gas nozzle in the enclosed yard, he committed only the lesser crime of criminal trespass.

c. Counsel was ineffective for failing to argue that Mr. Peschl committed only the lesser- included offense.

Mr. Peschl contends that counsel was ineffective for failing to argue that if Mr. Martin's testiomy was to be believed, Mr. Peschl committed only the lesser-included offense of criminal trespass. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The federal and state constitutions guarantee a criminal defendant effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court begins with the strong presumption that counsel rendered effective performance. *State v. McFarland*, 127 Wn.2d 322,

335, 899 P.2d 1251 (1995). Legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). However, if counsel's choices were not reasonable, the performance may be found to have fallen below an objective standard of reasonableness based on all the circumstances. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

Here, Mr. Peschl was entitled to have the court consider the lesser included offense, as the evidence supported it, meeting both the legal and factual prongs of the *Workman* test. The absence of the argument essentially eliminated Mr. Peschl's defense regarding the felony, as the court was left with no option other than to convict him of burglary if the court found Mr. Martin credible and found that Deputy Helton found the nozzle in the fully-enclosed area. The penalties for the lesser and greater offenses vary significantly. Second degree burglary is a class B felony, while criminal trespass is only a gross misdemeanor. Mr. Peschl was thus prejudiced by his lawyer's deficient performance, which resulted in his conviction for the greater offense of burglary.

Under this set of facts, counsel's failure to argue the lesser- included offense prejudiced the defendant. This amounted to ineffective assistance of counsel, entitling Mr. Peschl to a new trial.

### 3. THE COURT'S FAILURE TO COMPLY WITH CrR 6.1 REQUIRES REMAND FOR THE ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A trial court sitting as the trier of fact must enter written findings of fact and conclusions of law:

> In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

CrR 6.1(d); accord *State v. Head*, 136 Wn.2d 619, 622-26, 964 P.2d 1187 (1998). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. See *State v. Vailencour*, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). "Without comprehensive, specific written findings the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts." *State v. Greco*, 57 Wn. App. 196, 204, 787 P.2d 940 (1990). The court's oral findings are not binding and cannot replace written findings and conclusions. *Head*, 136 Wn.2d at 622; *State v. Hescock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). The factual findings, whether written or oral, must adequately identify the factual basis relied on to support each element of each count. *Head*, 136 Wn.2d at 623; Alvarez, 128 Wn.2d at 16. Although the court here gave an oral opinion as to Mr. Peschl's guilt on both counts (2RP at 74-75),

"A court's oral opinion is not a finding of fact." *State v. Hescock*, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *Head*, 136 Wn.2d at 622 (citation omitted). The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to oral rulings. *Head*, 136 Wn.2d at 624. Thus the proper remedy is to vacate the judgment and sentence and remand to the trial court for entry of written findings and conclusions. *Id.* at 624-26; *State v. Denison*, 78 Wn. App. 566, 572, 897 P.2d 437 (1995).

Here, the trial court failed to enter written findings and conclusion after the bench trial. In finding Mr. Peschl guilty, the court said, in essence, it did not believe the statement Mr. Peschl made to police that he was putting gas in his truck and that he bought the gas at another location and concluded that the metal was from the yard and that he had either entered the fenced area to attempt to obtain gas or that the partially-fenced curtilage constituted a "building." CrR 6.1(d) specifically requires the findings and conclusions to be "separately stated."

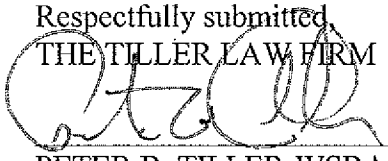
Mr. Peschl therefore requests this court remand for entry of written findings of fact and conclusions of law, and reserves the right to offer further argument depending on the content of any written findings. *Id.* at 625-26.

## E. CONCLUSION

The State did not prove all of the elements of second degree burglary, requiring reversal of the conviction and dismissal of the charge. Regarding Counts 1 and 2, In the absence of written findings and conclusions, the judgment and sentence should be vacated and the matter remanded for entry of written findings and conclusions of law.

DATED: May 18, 2016.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Steven Peschl

CERTIFICATE OF SERVICE

The undersigned certifies that on May 18, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

Mr. Adam Nick
Deputy Prosecuting Attorney
Po Box 790
Stevenson, WA 98648-0790

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300

Tacoma, WA 98402-4454

Mr. Steven Peschl
PO Box 666
Carson, WA 98610

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 18, 2016.

PETER B. TILLER

# TILLER LAW OFFICE

## May 18, 2016 - 4:55 PM

**Transmittal Letter**

Document Uploaded: 3-483653-Appellant's Brief.pdf

Case Name:

Court of Appeals Case Number: 48365-3

**Is this a Personal Restraint Petition?** Yes ■ No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

Sender Name: Kirstie Elder - Email: Kelder@tillerlaw.com